

EXHIBIT Y

U.S. Department of Homeland Security
800 N. Capitol St. NW STOP-5009
Washington, DC 20536-5009



U.S. Immigration
and Customs
Enforcement

April 5, 2011

TANAZ MOGADAM
ACLU IMMIGRANTS' RIGHTS PROJECT
125 BROAD ST., 18TH FL.
NEW YORK, NY 10004-2400

Dear Sir or Madam:

The Department of Homeland Security has received your letter appealing the adverse determination of your Freedom of Information Act/Privacy Act (FOIA/PA) request by U.S. Immigration and Customs Enforcement seeking records related to the Post-Order Custody Review Process.

On behalf of the Chief for the Government Information Law Division, we acknowledge your appeal request of **2011FOIA0003** and are assigning it number **OPLA11-130** for tracking purposes. Please reference this number in any future communications about your appeal.

A high number of FOIA/PA requests have been received by the Department. Accordingly, we have adopted the court-sanctioned practice of generally handling backlogged appeals on a first-in, first-out basis.¹ While we will make every effort to process your appeal on a timely basis, there may be some delay in resolving this matter. Should you have any questions concerning the processing of your appeal, please contact ICE FOIA at 1-202-732-0300, or by email at ice-foia@dhs.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Mathias", with a stylized flourish at the end.

Susan Mathias
Chief
Government Information Law Division
ICE Office of the Principal Legal Advisor
Department of Homeland Security

¹ Appeals of expedited treatment denials will be handled on an expedited basis.

EXHIBIT Z

U.S. Department of Homeland Security
800 N. Capitol St., NW STOP 5009
Washington, DC 20536-5009



U.S. Immigration
and Customs
Enforcement

April 14, 2011

TANAZ MOGADAM
ACLU IMMIGRANTS' RIGHTS PROJECT
125 BROAD ST., 18TH FL.
NEW YORK, NY 10004-2400

RE: OPLA11-130, 2011FOIA0003

Dear Mr. Mogadam:

This is in response to your letter dated April 5, 2011, appealing the withholding of records produced in a search conducted pursuant to your Freedom of Information Act (FOIA) request. Your initial request asked for all records related to the Post-Order Custody Review Process.

The U.S. Immigration and Customs Enforcement (ICE) FOIA Office initially had denied your request in part by withholding information based upon, among other exemptions, FOIA Exemption (b)(2)high. Upon review of the basis for your appeal, we have determined as follows:

In light of the recent United States Supreme Court ruling¹ on the use of Exemption 2, I am remanding your request to the ICE FOIA Office for reprocessing. All other issues raised in your appeal are to be addressed on remand.

Should you have any questions regarding this administrative remand of your appeal, please contact ICE at ice-foia@dhs.gov. In the subject line of the email, please include the word "appeal," your appeal number, which is OPLA11-130, and the FOIA case number, which is 2011FOIA0003.

Sincerely,

A handwritten signature in dark ink, appearing to read "Susan Mathias".

Susan Mathias
Chief
Government Information Law Division
ICE Office of the Principal Legal Advisor
Department of Homeland Security

¹ Glen Scott Milner v. Department of the Navy, No. 09-1163, 2011 WL 767699 (U.S. March 7, 2011).

EXHIBIT AA

U.S. Department of Homeland Security
800 N. Capitol St. NW, STOP 5009
Washington, DC 20536-5009



U.S. Immigration
and Customs
Enforcement

April 21, 2011

JUDY RABINOVITZ
ACLU
IMMIGRANTS' RIGHTS PROJECT
125 BROAD ST., 18TH FLOOR
NEW YORK, NY 10004

RE: ICE FOIA Case Number 2011FOIA0003

Dear Ms. Rabinovitz:

This is in regards to the processing of your September 21, 2010 Freedom of Information Act (FOIA) request to U.S. Immigration and Customs Enforcement (ICE). You have requested thirteen (13) categories of records and information related to the Post-Order Custody Review Process. A copy of your request is enclosed.

In your initial request you asked for a waiver of fees. Our October 4, 2010 letter informed you that we would hold your request for a fee waiver in abeyance pending quantification of records.

Fee waivers are properly granted "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."¹ More specifically, the Department of Justice issued revised fee waiver policy guidance on April 2, 1987.² These regulations set forth six factors to examine in determining whether the applicable legal standard for fee waiver has been met. Those six factors are as follows: (1) whether the subject of the requested records concerns "the operations or activities of the government"; (2) whether the disclosure is "likely to contribute" to an understanding of government operations or activities; (3) whether disclosure of the requested information will contribute to the understanding of the public at large, as opposed to the individual understanding of the requestor of a narrow segment of interested persons; (4) whether the contribution to public understanding of government operations or activities will be "significant"; (5) whether the requester has a commercial interest that would be furthered by the requested disclosure; and (6) whether the magnitude of any identified commercial interest to the requestor is sufficiently large in comparison with the public interest in disclosure that disclosure is primarily in the commercial interest of the requestor.

¹ See, Piper v. U.S. Dep't of Justice, 294 F. Supp. 2d 16, 24 (D.D.C. 2003).

² See, 5 U.S.C. § 552(e); see also FOIA Update, Vol. XIX, No. 3, at 6; FOIA Update, Vol. XIV, No. 3, at 8.

You have argued that you are entitled to a fee waiver as the requested records are “in the public interest and (are) likely to contribute significantly to public understanding of the operations or activities of the government.” You also argued that the requested records are not in the commercial interest of the requester. Additionally, you have argued that you are a “media requester” and are thus entitled to a waiver of fees.

As to the first of the five factors, there is no question that the requested information concerns the operations or activities of the government. The requested items are specifically regarding post order custody reviews and detention statistics carried out and maintained by the government.

The second factor requires that the disclosure “likely contribute” to the understanding of the public at large regarding specific government operations or activities. Many of the records, including detention statistics and other items are publicly available.³ However, this is not determinative as to the fee waiver request as there could be additional records that would be responsive to the request which are not readily available to the public.

The third factor necessitates that disclosure contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons.⁴ More specifically, agencies must evaluate the ability of the requester to disseminate the information.⁵ Furthermore, the intended method of that dissemination⁶ must be included in the request for a fee waiver.

In the case at hand, the original request submitted asserted that the ACLU is a non-profit organization that generally disseminates information gathered to the public at no cost, including through its website, newsletters, and handbooks. As an aside, “non-profit” status is not determinative of the commercial nature of information for the purposes of the fifth factor in assessing the propriety of a fee waiver.⁷ Legal representation, advocacy, or counsel by the requester, regardless of whether or not such is provided to a client pro bono, is certainly a trade or profession that would be advanced by the records sought.⁸ The request fails to specify the non-commercial intent to disseminate the information to significantly contribute to the public’s understanding.⁹ The requester has argued that they are a representative of the news media, and are thus entitled to a fee waiver. The requester, however, is not “an entity that is organized and operated to publish or broadcast news.”¹⁰ The website of the requester describes in detail the legislative, judicial, and community advocacy of the requester. However, nowhere in the website is there mention of a single role in news media, publication, or broadcasting. The request also only vaguely references “print and other media” that would be used to publish the requested records. The commercial interest of the requester can be gleaned from their website¹¹, and is directly advanced by the requested

³ See, <http://www.ice.gov/foia/readingroom.htm>.

⁴ See, *Forest Guardian v. U.S. Dept. of Interior*, 416 F.3d at 1179 (10th Cir. 2005).

⁵ *Orloff*, No. 98-2819, slip op. at 21 (D.D.C. Mar. 22, 2002).

⁶ *Hall v. CIA*, No. 04-0814, 2005 WL 850379, at 7 (D.D.C. Apr. 13, 2005).

⁷ *Critical Mass Energy Project v. NRC*, 830 F.2d 278, 281 (D.C. Cir. 1987).

⁸ See, e.g., *VoteHemp Inc. v. DEA*, 237 F. Supp. 2d at 65 (D.D.C. 2002).

⁹ See, *Citizens Progressive Alliance v. United States Bureau of Indian Affairs*, 241 F. Supp. 2d 1342, 1366 (D.N.M. 2002).

¹⁰ 28 C.F.R. § 16.11(b)(6).

¹¹ See, e.g., *VoteHemp Inc.*, *supra*. (indicating that the commercial interest of a requester can be obtained from the requester’s website).

information in this instance. Furthermore, merely being the “publisher of a website” or “making information available” does not qualify one for news media status.¹² Even news media requesters are not treated as a “representative of the news media when it requests documents . . . in aid of its nonjournalistic activities.”¹³

As such, the publication of the information regarding post order custody review cases must be compared to the commercial interest of the requester in advancing advocacy on behalf of any given clients or political positions of the requester. Any public interest in the records would be restricted to the limited segment of the population of the affected communities and detainees discussed in the request.

As such, the request for a fee waiver is denied pursuant to the applicable provisions of 5 U.S.C. § 552 cited above.

The FOIA provides three levels of fees that may be assessed to process a FOIA request according to categories of FOIA requesters. *See* 5 U.S.C. § 552(a)(4)(A)(ii)(I),(II),(III) (2000).

Our acknowledgement of your request notified you that you were placed in the “all other” requester category. Pursuant to the DHS implementing regulations, 6 C.F.R. § 5.11, “all other” or non-commercial requesters are responsible to pay 10-cents a page for duplication, although the first 100 pages are free, as are the first two hours of search time, after which you will pay the per quarter-hour rate (\$4.00, \$7.00, \$10.25) of the searcher. To comply with your request, a search of the ICE Office of the Principal Legal Advisor (OPLA) and the ICE Office of Enforcement and Removal Operations (ERO) was conducted. To date, a total of 74 hours of search time so far have been spent. Billable search costs at the respective quarter hour rates are as follows:

OPLA

4 Hour Search (managerial) $\$10.25 \times 16 = \164.00

ERO HQ (partial search completed)

70 Hour Search and review (professional) $\$7.00 \times 280 = \1960.00

The cost incurred so far in processing your request is thus [74-2] hours at the respective quarter hour rate¹⁴ totals \$2,042.00. Based on this information it is estimated that the fee to process your request so far will equal approximately \$2,042.00. Considering the search for responsive records may have not yet been completed, depending on the result of the remand of your administrative appeal and the referral of your request to another agency, the estimated fee may only be a portion of the total fee associated with processing this request.

Please confirm, in writing, your willingness to pay the estimated processing fee of \$2,042.00. Please send your written confirmation directly to this office within 15 days from the date of this letter.

¹² See, Brown v. U.S. Patent & Trademark Office, 226 F. App'x 866 (11th Cir. 2007); National Security Archive v. DOD, 880 F.3d 1381, 1387 (D.C. Cir. 1989).

¹³ Elec. Privacy Info. Ctr., 241 F. Supp. 2d at 14 n.6.

¹⁴ $[8 \times \$10.25] + [280 \times \$7.00] = \$2,042$

Pending receipt of your response, we will toll your request under the provisions of the FOIA. If we do not receive confirmation of the amount you are willing to pay, or an amended request from you within 15 business days from the date of this letter, we will assume you are no longer interested in obtaining the requested records and will consider your request withdrawn.

If you have any questions, or would like to discuss this matter, please feel free to contact our office at (202) 732-0300. Please refer to **2011FOIA0003** in all future correspondence.

Sincerely,

 A handwritten signature in black ink, appearing to read 'Katrina' followed by a stylized 'M' and 'K'. To the right of the signature, the word 'FOR' is written in a similar handwritten style.

Catrina M. Pavlik-Keenan
FOIA Officer

Enclosures: October 4, 2010 Fee Letter
 September 21, 2010 Initial Request
 March 4, 2010 Interim Response Letter

U.S. Department of Homeland Security
800 North Capitol St., NW #585
Washington, DC 20536



U.S. Immigration
and Customs
Enforcement

Oct. 4, 2010

Judy Rabinovitz
ACLU
125 Broad Street, 18th Fl.
New York, NY 10004

RE: FOIA Case Number 2011-FOIA-0003

Dear Ms. Rabinovitz:

This letter responds to your requests for a waiver of fees and the expedited processing of your Freedom of Information Act (FOIA) request dated September 21, 2010. You have requested records related to the Post-Order Custody Review Process.

As it relates to your fee waiver request, your request will be held in abeyance pending the quantification of responsive records. The DHS FOIA Regulations, 6 CFR § 5.11(k)(2), set forth six factors to examine in determining whether the applicable legal standard for a fee waiver has been met: (1) Whether the subject of the requested records concerns "the operations or activities of the government;" (2) Whether the disclosure is "likely to contribute" to an understanding of government operations or activities; (3) Whether disclosure of the requested information will contribute to the understanding of the public at large, as opposed to the individual understanding of the requestor or a narrow segment of interested persons; (4) Whether the contribution to public understanding of government operations or activities will be "significant;" (5) Whether the requester has a commercial interest that would be furthered by the requested disclosure; and (6) Whether the magnitude of any identified commercial interest to the requestor is sufficiently large in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requestor. If any responsive records are located, we will consider these factors in our evaluation of your request for a fee waiver.

Immigration and Customs Enforcement (ICE) evaluates requests for expedited processing based upon the legal standards set forth in the Electronic Freedom of Information Act Amendments of 1996 as incorporated into the Department of Homeland Security's Freedom of Information Act regulations¹. These regulations establish two factors to examine in determining whether the applicable legal standard for expedited processing has been met. I have considered the following factors in my evaluation of your request for expedited processing: (1) whether the lack of an expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; and (2) if there is an urgency to inform the public about an actual or alleged federal government activity, if the request is made by a person primarily engaged in disseminating information.

Upon review of your request and a careful consideration of the factors listed above, I have determined to deny your request for expedited processing.

¹ 6 CFR § 5.5(d).

The undersigned is the person responsible for this determination. You may appeal this finding by writing to the Associate General Counsel (General Law), Department of Homeland Security, FOIA Appeals, Washington, DC 20528, within 60 days from the date of this determination. It should contain any information and state, to the extent possible, the reasons why you believe the initial determination should be reversed and the envelope in which the appeal is mailed in should be prominently marked "FOIA Appeal." The Privacy Office's determination will be administratively final.

If you have any questions pertaining to your request, please contact the FOIA Office at (202) 732-0300.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Pavlik-Keenan", with a long, sweeping horizontal line extending to the right.

Catrina M. Pavlik-Keenan
FOIA Officer

A small, stylized handwritten mark or signature, possibly initials, located below the printed name.

EXHIBIT BB



May 5, 2011

Ms. Catarina Pavlik-Keenan
FOIA Officer
U.S. Immigration and Customs Enforcement
800 N. Capitol Street NW, STOP 5009
Washington, D.C. 20536-5009

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
IMMIGRANTS'
RIGHTS PROJECT

RE: 2011-FOIA-0003

Dear Ms. Pavlik-Keenan,

PLEASE RESPOND TO:
NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2660
F/212.549.2654
WWW.ACLU.ORG

OFFICERS AND DIRECTORS
SUSAN H. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

This is an appeal under the Freedom of Information Act ("FOIA") of the decision by Immigration and Customs Enforcement ("ICE"), dated April 21, 2011 (the "Fee Waiver Denial," attached as Exhibit A) to deny the fee waiver request of the American Civil Liberties Union ("ACLU") and the decision to deny the ACLU's request for "representative of the news media" status.

A. Background

The ACLU requested a fee waiver and "representative of the news media" status in a September 21, 2010 FOIA request, seeking records related to prolonged immigration detention and the post-order custody review ("POCR") process that the Department of Homeland Security ("DHS") applies to immigration detainees with administratively final orders of removal (the "ACLU FOIA Request"). On October 4, 2010, ICE informed the ACLU that it would hold the ACLU request for a fee waiver in abeyance pending a review of the ACLU FOIA Request. On April 21, 2011, ICE denied the fee waiver request (the "Fee Waiver Denial").

In the Fee Waiver Denial, ICE concludes that the ACLU should not be considered a "representative of the news media" under FOIA and that the ACLU is "not an entity that is organized and operated to publish or broadcast news." Fee Waiver Denial, at 2. Those conclusions are in error. As demonstrated below, numerous other agencies and courts have found that the ACLU is a representative of the news media for purposes of FOIA, and have granted the ACLU fee waivers in conjunction with FOIA requests.

Further, in the ACLU FOIA Request, the ACLU plainly states that it is an “organization whose main professional activity or occupation is information dissemination.” ACLU FOIA Request, at 9. The Fee Waiver Denial has not established the ACLU’s description of its activities is incorrect.

In addition, ICE wrongly states that the ACLU FOIA Request “fails to specify the non-commercial intent to disseminate the information to significantly contribute to the public’s understanding.” Fee Waiver Denial at 2. To the contrary, the ACLU FOIA Request specifically lists numerous non-commercial ways that the ACLU disseminates information to the public, stating, *inter alia*, that the ACLU “disseminates information through its high-traffic website” and “publishes newsletters, news briefings, right-to-know handbooks and other materials that are widely disseminated to the public.” ACLU FOIA Request at 8-9. The explicit goal of the ACLU FOIA Request is to further “public understanding of government conduct: specifically, whether the post-order custody reviews for detainees in the custody of ICE are sufficient to satisfy the agency’s statutory and constitutional obligations.” *Id.* at 10. The non-commercial intent behind the ACLU FOIA Request is sufficiently explicit and ICE’s conclusion otherwise is incorrect.

B. The ACLU is a Representative of the News Media

A waiver of search and review fees is warranted here because the ACLU is a “representative of the news media” and the records requested are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II). The Fee Waiver Denial wrongly focuses on only one basis for an entity to be considered a representative of the news media. *See* Fee Waiver Denial (stating that “[t]he requestor, however, is not ‘an entity that is organized and operated to publish or broadcast news.’”) (citing 28 C.F.R. §16.11(b)(6)). ICE, however, has too narrowly construed the FOIA statute in relying on its own regulations, contrary to FOIA’s legislative history calling for a broad reading of the phrase “representative of the news media.” As Senator Leahy said during debate about FOIA’s fee waiver provisions: “It is critical that the phrase ‘representative of the news media’ be broadly interpreted if the act is to work as expected In fact, any person or organization which regularly publishes or disseminates information to the public ... should qualify for waivers as a ‘representative of the news media.’” *National Sec. Archive v. Dep’t of Defense*, 880 F.2d 1381, 1386 (D.C. Cir. 1989) (citing 132 Cong.Rec. S14298 (daily ed. Sept. 30, 1986));

see also Elec. Privacy Info. Ctr. v. Dep't of Defense, 241 F. Supp. 2d 5, 11 (D.D.C. 2003).

Moreover, FOIA's statutory language does not require a requestor to be "organized and operated to publish or broadcast news" to the public. Instead, FOIA states that any "entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience" qualifies as a "representative of the news media" for the purposes of FOIA's fee-limitation provisions. 5 U.S.C. § 552(a)(4)(A)(ii). Courts have concluded that, under this definition in FOIA, the ACLU qualifies as a "representative of the news media." See ACLU of Washington v. U.S. Dep't of Justice, Order Granting in Part Defendant's Motion for Summary Judgment and Ordering Production or Supplementation of Vaughn Index, at 18, Case No. C09-0642RSL, (W.D. Was Mar. 10, 2011) (attached as **Exhibit B**). Other courts have reached that same conclusion regarding entities similar to the ACLU. See Nat'l Sec. Archive v. Dep't of Defense, 880 F.2d 1381, 1387 (D.C. Cir. 1989); Elec. Privacy Info. Ctr., 241 F. Supp. 2d at 15 (non-profit organization that gathered information and published it in newsletters and otherwise for general distribution qualified as representative of news media for purpose of limiting fees).

Despite ICE's claims in the Fee Waiver Denial that the ACLU does not have a "role in news media, publication, or broadcasting," public education and dissemination of information through various forms of media is a key component of the ACLU's principal mission of preserving and defending the guarantees of the Bill of Rights and civil-rights laws, using litigation as just one of many tactics.

The ACLU regularly publishes newsletters and reports to inform the public regarding civil rights matters. For example, the ACLU publishes a newsletter at least twice a year that reports on and analyzes civil-liberties-related current events. The newsletter is distributed to approximately 450,000 people. The ACLU also publishes a bi-weekly electronic newsletter, which is distributed to approximately 300,000 people (both ACLU members and non-members) by e-mail. Both of these newsletters often include descriptions and analyses of information obtained from the government through FOIA, as well as information about cases, governmental policies, pending legislation, abuses of constitutional rights, and polling data. Cf. Elec. Privacy Info. Ctr., 241 F. Supp. 2d at 13-14 (finding EPIC a representative of the news media under

Department of Defense regulations because it published a “bi-weekly electronic newsletter that is distributed to over 15,000 readers” about “court cases and legal challenges, government policies, legislation, civil rights, surveys and polls, legislation, privacy abuses, international issues, and trends and technological advancements”); Ctr. for Pub. Integrity v. Dep’t of Health & Human Servs., No. 06-1818 (JDB), 2007 WL 2248071, at *5 (D.D.C. Aug. 3, 2007) (finding CPI to be a news-media requester because its journalist members “write and post an online newsletter” and post information obtained through FOIA in that newsletter).

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

With respect to litigation in which the ACLU is involved, the ACLU publishes and disseminates information about cases themselves (e.g., case developments, analyses of case developments, a comprehensive archive of court filings, and judicial opinions). These efforts, even standing alone, are a significant endeavor in publication and dissemination of news. Case webpages, however, do not just disseminate information about case developments; these webpages also have educational material about the particular civil-liberties issue or problem, recent news about the particular issue, analyses of congressional or executive-branch action on the particular issue, governmental documents obtained through FOIA about the particular issue, and more in-depth analytic and educational multimedia features on the issue. For example, the ACLU’s website about its national-security-letter (“NSL”) cases, <http://www.aclu.org/nsl>, includes, among other things, an explanation of what NSLs are; information about and document repositories for the ACLU’s NSL cases; links to documents obtained through FOIA about various agencies’ use of NSLs; NSL news in the courts, Congress, and executive agencies; links to original blog posts commenting on and analyzing NSL-related news; educational web features about the NSL gag-order power; public education reports about NSLs and the Patriot Act; news about and analysis of the Department of Justice Inspector General’s reviews of the FBI’s use of NSLs; the ACLU’s policy analysis and recommendations for reform of the NSL power; charts with analyzed data about the government’s use of NSLs; “myths-and-facts” documents; and links to information and analysis of related issues.¹

¹ For a sampling of other similar case pages with case information, reporting of news on an issue, blogs, and original analytic and educational content see: <http://www.aclu.org/lgbt/relationships/californiamarriage.html> (same-sex-marriage case page) or <http://www.aclu.org/immigrants/detention/hutto.html> (immigration-detention-conditions case page).

The ACLU also regularly publishes reports about governmental activity and civil-liberties issues based on its analysis of information derived from various sources, including information obtained from the government through FOIA.² This material is broadly circulated to the public and available to everyone, including individuals, tax-exempt organizations, not-for-profit groups, and law students and faculty, for no cost or for a nominal fee. See Elec. Privacy Info. Ctr., 241 F. Supp. 2d at 11 (finding EPIC a news-media requester because it “researches issues on privacy and civil liberties, reports on this information, analyzes relevant data, evaluates the newsworthiness of material and puts the facts and issues into context, publishing and distributing this ‘news’ through the sale of its books to the public.”); see also Nat’l Sec. Archive, 880 F.2d at 1386 (finding National Security Archive to be a news-media requester because it intended to make public “document sets” on “topic[s] of current interest”). Since 2007 alone, the ACLU’s national projects have published more than twenty-five reports in which the ACLU gathered information and “use[d] [their] editorial skills to turn the raw materials into a distinct work, and distribute[d] that work to an audience.” Id. at 1387.³ Many ACLU reports, including one on prolonged immigration detention itself, include description and analysis of governmental documents obtained through FOIA.⁴

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

2 In addition to the national ACLU offices, there are ACLU affiliate offices located throughout the United States. These offices further disseminate ACLU material to local residents, schools, and organizations through a variety of means, including their own websites, publications, and newsletters. Further, the ACLU makes archived material available at the American Civil Liberties Union Archives at Princeton University Library.

3 *See, e.g., In For A Penny: The Rise of America’s New Debtors’ Prisons* (October 2010) <http://www.aclu.org/prisoners-rights-racial-justice/penny-rise-americas-new-debtors-prisons>; *Mental Illness and the Death Penalty* (May 2009), available at http://www.aclu.org/pdfs/capital/mental_illness_may2009.pdf; *Human Rights Begin at Home* (Apr. 2009), available at http://www.udhr60.org/human_rights_full.pdf; *Missing the Mark: Alternative Schools in the State of Mississippi* (Feb. 2009), available at http://www.aclu.org/pdfs/racialjustice/missingthemark_report.pdf; *De Facto Disenfranchisement* (Oct. 2008), available at http://www.aclu.org/pdfs/racialjustice/defactodisenfranchisement_report.pdf; *A Violent Education: Corporal Punishment of Children in U.S. Public Schools* (Aug. 2008), available at http://www.aclu.org/pdfs/humanrights/aviolenteducation_report.pdf; *Fusion Center Update* (July 2008), available at http://www.aclu.org/pdfs/privacy/fusion_update_20080729.pdf.

4 *See Prolonged Immigration Detention of Individuals Who are Challenging Removal* (July 2009), available at http://www.aclu.org/files/images/asset_upload_file766_40474.pdf. *See also, e.g., Reclaiming Patriotism*, (Mar. 2009), available at http://www.aclu.org/pdfs/safefree/patriot_report_20090310.pdf; *The Excluded:*

Based on the described activities, the ACLU qualifies as a representative of the news media as defined under FOIA. Furthermore, ICE's position in the Fee Waiver Denial is contrary to that of numerous federal agencies that have determined that the ACLU is a representative of the news media with respect to other FOIA requests. See, e.g., Exhibit C (November 4, 2009 determination by the State Department that the ACLU is a "representative of the news media."); Exhibit D (March 31, 2009 determination by the State Department that the ACLU is a "representative of the news media"); Exhibit E (December 18, 2008 determination by the Department of Justice that the ACLU is a "representative of the news media"); Exhibit F (May 3, 2005 determination by the Department of Commerce that the ACLU is a "representative of the news media").

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

In fact, the DHS itself recently approved the request of the ACLU of Southern California ("ACLU/SC") for a fee waiver after the ACLU/SC appealed the DHS's initial decision that the ACLU/SC was not entitled to either "representative of the news media" status or a fee waiver. The DHS approval dated April 13, 2011 and the supplemental appeal letter of the ACLU/SC dated April 4, 2011 are attached as Exhibits G and H, respectively. ICE should not take an inconsistent position on the ACLU's fee waiver request in the present circumstances.

C. **Disclosure of the Requested Information is in the Public Interest**

The DHS FOIA regulations provide that "[r]ecords responsive to a request will be furnished without charge . . . where a component determines, based on all available information, that the requester has demonstrated that: (i) Disclosure of the requested information is in the public interest because it is likely to contribute significantly to public

Ideological Exclusion and the War on Ideas (Oct. 2007), available at http://www.aclu.org/pdfs/safefree/the_excluded_report.pdf; *History Repeated: The Dangers of Domestic Spying by Federal Law Enforcement* (May 2007), available at http://www.aclu.org/images/asset_upload_file893_29902.pdf; *No Real Threat: The Pentagon's Secret Database on Peaceful Protest* (Jan. 2007), available at http://www.aclu.org/pdfs/safefree/spyfiles_norealthreat_20070117.pdf; *Unpatriotic Acts: The FBI's Power to Rifle Through Your Records and Personal Belongings Without Telling You* (July 2003), available at http://www.aclu.org/FilesPDFs/spies_report.pdf.

understanding of the operations or activities of the government; and (ii) Disclosure of the information is not primarily in the commercial interest of the requester.” 6 C.F.R. § 5.11(k)(1). The current FOIA fee waiver standard specifically defines the term “public interest” by providing that fees should be waived or reduced “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” U.S.C. § 552(a)(4)(A)(iii). Like the DHS FOIA Regulations, FOIA’s statutory fee waiver standard thus contains two basic requirements—the public interest requirement and the requirement that the requester’s commercial interest in the disclosure, if any, must be less than the public interest in it. See Inst. for Wildlife Prot. v. United States Fish & Wildlife Serv., 290 F. Supp. 2d 1226, 1228 (D. Or. 2003) (recognizing that statute establishes two-part test for fee waiver); VoteHemp v. DEA, 237 F. Supp. 2d 55, 58 (D. D.C. 2002), (reiterating “two-prong analysis” required for fee waiver requests).

As demonstrated below, the ACLU’s request does not involve a commercial interest, and the disclosure of the requested information is in the public interest.

Under the DHS FOIA regulations, the determination of whether the requested information is in the public interest is based on four factors:

- (1) Whether the subject of the requested records concerns “the operations or activities of the government.”
- (2) Whether the disclosure is “likely to contribute” to an understanding of government operations or activities.
- (3) Whether disclosure of the requested information will contribute to “public understanding.” The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester’s expertise in the subject area and ability and intention to effectively convey information to the public shall be considered. It shall be presumed that a representative of the news media will satisfy this consideration.

- (4) Whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities. The public’s understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a significant extent. Components shall not make value judgments about whether information that would contribute significantly to public understanding of the operations or activities of the government is ‘important’ enough to be made public.

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

6 C.F.R. § 5.11(k)(2)(i-iv).

The ACLU clearly meets these standards for a public interest fee waiver. Disclosure of the information sought is in the public interest and will contribute significantly to the public’s understanding of ICE’s policies and practices with respect to immigrant detention and the POCR process. Indeed, the ACLU has an entire webpage devoted to the issue of prolonged immigration detention, which informs the public about the government’s activities and increases awareness about the numbers of people in the immigration detention system.⁵ The ACLU’s ability and intent to convey the requested information to the public, and its status as a representative of the news media, are factors warranting a fee waiver. The Fee Waiver Denial does not seriously argue that the requested disclosure would not contribute to the public’s understanding of the government activities; rather, the Fee Waiver Denial wrongly attempts to portray the ACLU as having a commercial interest in the requested information and baselessly questions the ACLU’s ability and intent to disseminate widely the requested information.

The Fee Waiver Denial’s statement that the “commercial interest” of the ACLU can be “gleaned” from its website does not square with a review of the various pages of the ACLU’s website, which do not contain an advancement of a commercial interest of the ACLU. To the contrary, the ACLU’s website contains, among other items indicative of a media entity, numerous recent articles drafted by the ACLU relating to immigrant detention, the underlying subject of

⁵ See “No End in Sight: Immigrants Locked Up for Years Without Hearing” (June 17, 2009) (available at <http://www.aclu.org/immigrants-rights/no-end-sight-immigrants-locked-years-without-hearings>).

the ACLU FOIA Request.⁶ Given that there is nothing to suggest the ACLU has a commercial interest in the information requested, the fee waiver cannot properly be denied on the ground that the ACLU's interest is primarily commercial. See Clemente v. FBI, 741 F. Supp. 2d 64, 77 (D.D.C. 2010).

ICE cites the VoteHemp case to imply that the ACLU is seeking information for commercial purposes because "[l]egal representation, advocacy, or counsel by the requester," even if *pro bono*, is "a trade or profession that would be advanced by the records sought." Fee Waiver Denial at 2 (citing VoteHemp Inc. v. DEA, 237 F. Supp. 2d 55, 65 (D. D.C. 2002)). However, that case is clearly inapplicable (and furthermore does not support the broad proposition for which it is cited). In VoteHemp, the requestor did not challenge the government agency's categorization of its FOIA request as a "commercial use request." *Id.* at 64. In addition, the district court found that the plaintiff's website contained direct links to companies that sell hemp products and requested donations to support the hemp "industry's" legal efforts. *Id.* at 65. Other courts have rejected a broad reliance by a government agency on the VoteHemp case under circumstances similar to those presented here. See Natural Resources Defense Council v. U.S. Environmental Protection Agency, 581 F. Supp. 2d 491, 501, n.10 (S.D.N.Y. 2008) (rejecting the government's argument that the nonprofit requester had a commercial interest and distinguishing VoteHemp because that court determined there that the requester had a specific commercial interest in the hemp industry's financial success and that the liberal construction generally applied to the fee waiver provision was thus inapplicable).

The Fee Waiver Denial also wrongly contends that "the intended method of that dissemination [of requested information] must be included in the request for a fee waiver" to support a determination that the requested information is in the public interest. To the contrary, the FOIA statute contains no such requirement; nor does the case cited for that proposition in the Fee Waiver Denial, Hall v. CIA, No. 04-0814, 2005 U.S. Dist. LEXIS 6638 at *23 (D. D.C.

⁶ See, e.g., "Georgia Legislature Passes Racial Profiling Law" (April 15, 2011) (available at <http://www.aclu.org/immigrants-rights/georgia-legislature-passes-racial-profiling-law>); Appellate Court Upholds Decision Blocking Arizona's Extreme Racial Profiling Law (April 11, 2011) (available at <http://www.aclu.org/immigrants-rights/appellate-court-upholds-decision-blocking-arizona-s-extreme-racial-profiling-law>). Such articles are but two of the many examples that show that the ACLU distills and disseminates news to the public at large on a regular and ongoing basis.

Apr. 13, 2005). Hall merely states “a requester must establish that it has a firm intent to disseminate, rather than merely make available, the requested information” to avoid the situation in which every “conceivable FOIA requester could simply declare itself a ‘representative of the news media’ to circumvent applicable fees.” Id. The ACLU has demonstrated its firm intent to disseminate, free of charge, the requested information to a large segment of the public via various media vehicles including newsletters, handbooks, and its website. See ACLU FOIA Request.

Besides not being supported by case law, the concept that a FOIA requestor would have to describe, in its initial FOIA request, the specific intended method of dissemination is illogical; media members must first review the information they receive before deciding the best way to distribute that information. Rather, the applicable factor in determining whether disclosure of records will contribute significantly to the public’s understanding of the operation or activities of the government is “the ability of the requester to disseminate the information.” Carney v. U.S. Dep’t of Justice, 19 F.3d 807, 814 (2d Cir. 1994). As stated in the ACLU FOIA Request, the ACLU has demonstrated its ability to disseminate information it receives through various media vehicles, including newsletters, handbooks, podcasts, and its website.

Finally, it is well-established that “Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers for noncommercial requesters.’” Natural Resources Defense Council, 581 F. Supp. 2d at 497 (citing 132 Cong. Rec. 27,190 and remarks of Sen. Leahy) (internal citation omitted); see also Environmental Protection Info. Center v. U.S. Forest Serv., 432 F.3d 945, 947 (9th Cir. 2005). In 1974, Congress added the fee waiver provision in “an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests,” particularly journalists, scholars, and non-profit public interest groups. See Community Legal Servs., Inc., v. U.S. Dep’t of Housing & Urban Devel., 405 F. Supp. 2d 553, 555 (E.D. Pa. 2005). “The fee waiver provision was amended in 1986 in order ‘to remove the roadblocks and technicalities that continued to stand in the way of obtaining a fee waiver.’” Id. (citing 132 Cong. Rec. S16, 489-01 (daily ed. Oct. 15, 1986) (statement of Sen. Leahy)). Simply put, the legislative history of the FOIA fee waiver provision, as well as the well-established body of case law holding that it is to be liberally construed, demonstrate conclusively that the ACLU should be granted a fee waiver here.

Page 11

FOIA's expanded fee waiver provision was intended specifically to facilitate access to agency records by citizen "watchdog" organizations, which utilize FOIA to monitor and mount challenges to governmental activities. See Better Gov't Ass'n v. Dep't of State, 780 F.2d 86, 88-89 (D.C. Cir. 1986) (fee waiver intended to benefit public interest watchdogs). Fee waivers are essential to such groups, which:

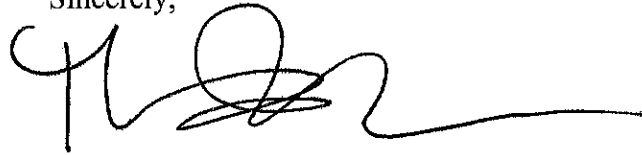
rely heavily and frequently on FOIA and its fee waiver provision to conduct the investigations that are essential to the performance of certain of their primary institutional activities—publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions....

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

Better Gov't Ass'n, 780 F.2d at 93-94.

Based on the foregoing, the ACLU's fee waiver request should be granted. Pursuant to 5 U.S.C. § 552(a)(6)(A)(ii), the ACLU expects a response to this appeal within the twenty (20) day statutory time limit. If you have any questions, I can be contacted by mail at the address below, or by telephone at (212) 284-7316.

Sincerely,



Ms. Tanaz Moghadam
Staff Attorney
ACLU Immigrants' Rights
Project
125 Broad St., 18th Floor
New York, NY 10004
Tel: 212-284-7316
Fax: 212-549-2654
Email: tmoghadam@aclu.org

EXHIBIT CC

U.S. Department of Homeland Security
800 N. Capitol St. NW STOP-5009
Washington, DC 20536-5009



U.S. Immigration
and Customs
Enforcement

May 9, 2011

TANAZ MOGADAM
ACLU IMMIGRANTS' RIGHTS PROJECT
125 BROAD ST., 18TH FL.
NEW YORK, NY 10004-2400

Dear Sir or Madam:

The Department of Homeland Security has received your letter appealing the adverse determination of your Freedom of Information Act/Privacy Act (FOIA/PA) request by U.S. Immigration and Customs Enforcement seeking records related to the Post-Order Custody Review Process.

On behalf of the Chief for the Government Information Law Division, we acknowledge your appeal request of **2011FOIA0003** and are assigning it number **OPLA11-171** for tracking purposes. Please reference this number in any future communications about your appeal.

A high number of FOIA/PA requests have been received by the Department. Accordingly, we have adopted the court-sanctioned practice of generally handling backlogged appeals on a first-in, first-out basis.¹ While we will make every effort to process your appeal on a timely basis, there may be some delay in resolving this matter. Should you have any questions concerning the processing of your appeal, please contact ICE FOIA at 1-202-732-0300, or by email at ice-foia@dhs.gov.

Sincerely,

Susan Mathias
Chief
Government Information Law Division
ICE Office of the Principal Legal Advisor
Department of Homeland Security

¹ Appeals of expedited treatment denials will be handled on an expedited basis.

EXHIBIT DD

U.S. Department of Homeland Security
800 N. Capitol Street, NW, Suite 585
Washington, DC 20536-5009



**U.S. Immigration
and Customs
Enforcement**

April 26, 2011

Judy Rabinovitz
American Civil Liberties Union
Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, NY 10004

RE: ICE FOIA Case Number 2011FOIA0003

Dear Ms. Rabinovitz:

This is the second and final response to your September 21, 2010 Freedom of Information Act (FOIA) request to U.S. Immigration and Customs Enforcement (ICE). You have requested thirteen (13) categories of records and information related to the Post-Order Custody Review Process; specifically:

1. All records reflecting the following information for individuals who had been detained six months or longer since being taken into ICE custody (i.e., "prolonged detainees") on the date the search is conducted (please run the search as a "snapshot" as of the date, not as a range of time up until the date);
 - a. The number of such detainees organized by field office.
 - b. The nationality of such detainees.
 - c. The length of such detainees' detention since being taken into ICE custody.
 - d. The number of such detainees with an administratively final order of removal (on date of snapshot).
 - e. The number of such detainees with an administratively final order of removal that was judicially stayed (on date of snapshot).
 - f. The number of such detainees whose removal proceedings were pending before the Immigration Judge (on date of snapshot).
 - g. The number of such detainees whose removal proceedings were pending before the Board of Immigration Appeals (on date of snapshot).
 - h. The number of such detainees whose removal proceedings were pending before the Court of Appeals (on date of snapshot).
 - i. The number of such detainees whose removal proceedings were pending before the Immigration Judge or Board of Immigration Appeals on remand (on date of snapshot).
2. All 90-day, 180-day, and any subsequent post-order custody review (POCR) decisions for individuals who were detained six months or longer since being taken into ICE custody (i.e., "prolonged detainees") from November 1, 2008 onwards, organized per detainee.
3. All records reflecting the following information for individuals who were detained six months or longer since being taken into ICE custody (i.e., "prolonged detainees") from November 14, 2001 onward and who ultimately prevailed in their removal proceedings:

- a. The start and end dates of such detainees' detention.
 - b. The number of such detainees organized by field office.
 - c. The nationality of such detainees.
 - d. The length of such detainees' detention.
 - e. The statutory basis for such detainees' detention (i.e., 8 U.S.C. §§ 1225, 1226(a), 1226(c), or 1231)
 - f. The justification for detaining each of these individuals, including, but not limited, to copies of their custody review determinations, their bond hearing determinations, their parole requests and denials, any reviews of their custody determinations by immigration judges, and any other documents concerning their continued detention.
 - g. The specific basis for their release (i.e., "proceedings terminated," cancellation of removal granted, adjustment of status granted, asylum granted).
4. All 90-day, 180-day, and any subsequent post-order custody review (POCR) decisions for individuals who were detained six months or longer since being taken into ICE custody (Le., "prolonged detainees") who were released from custody from November 14, 2001 onwards because they won their removal cases, organized per detainee.
5. All records reflecting the following information for detainees who were released at their 90-day custody review from November 14, 2001 onward:
 - a. The number of such detainees per year.
 - b. The number of such detainees organized by field office.
 - c. The nationality of such detainees.
 - d. The number of such detainees with an administratively final order of removal that was judicially stayed, and the field office and nationality of such detainees
6. All records reflecting the following information for detainees who were detained six months or longer following the entry of an administratively final order of removal that was not judicially stayed (i.e., "Zadvydas detainees"), including those who were eventually released, those who were eventually removed, and those who continue to be detained, from November 14, 2001 onward.
 - a. The number of such detainees per year, including those released, those removed, and those who continue to be detained.
 - b. The number of such detainees organized by field office.
 - c. The nationality of such detainees.
 - d. The date of such detainees' final administrative order of removal, and if the removal order was at any point stayed, the date that the stay was lifted.
 - e. The length of such detainees' total detention, from when they were first taken into ICE custody.
 - f. The length of such detainees' post-final-order detention (i.e., from when a final administrative order was issued, or in the case of a removal order that was stayed, from the date when the stay was lifted).
 - g. For those detainees who were released from detention, the reason for their release (viz., the "book out" date).
7. All 90-day, 180-day, and any subsequent post-order custody review (POCRs) decisions for all detainees who were detained six months or longer following the entry of an administratively final order of removal that was not judicially stayed (i.e., "Zadvydas detainees") from November 14, 2001 onwards, organized per detainee.
8. All records reflecting the following information for all detainees who were detained six months or longer following the entry of an administratively final order of removal that was

not judicially stayed (i.e., "Zadvydas detainees") and who were released from custody from November 14, 2001 onward for the purpose of immediate removal from the United States:

- a. The number of such detainees per year.
 - b. The start and end dates of their detention.
 - c. The number of such detainees organized by field office.
 - d. The nationality of such detainees.
 - e. The date of such detainees' final administrative order of removal, or in the case of a removal order that was at any point stayed, the date that the stay was lifted.
 - f. The length of such detainees' total detention from when they were first taken into ICE custody.
 - g. The length of such detainees' post-final-order detention (i.e., from when a final administrative order was issued, or in the case of a removal order that was stayed, from the date when the stay was lifted).
9. All records reflecting the following information for all detainees with administratively final orders of removal that were not judicially stayed (not just those detained six months following the entry of a final order of removal that was not judicially stayed), and who were released from custody from November 14, 2001 onward because their removal was not significantly likely in the reasonably foreseeable future:
- a. The number of such detainees released per year.
 - b. The start and end dates of their detention.
 - c. The number of such detainees released per year by field office.
 - d. The nationality of such detainees.
 - e. The date of such detainees' final administrative order of removal, and if the removal order was stayed, the date the stay was lifted.
 - f. The length of such detainees' total detention since being taken into ICE custody.
 - g. The length of such detainees' post-final-order detention (i.e., from when a final administrative order was issued, or in the case of a removal order that was stayed, from the date when the stay was lifted).
 - h. The number of such detainees who filed petitions for writs of habeas corpus, and the case name and court where such petitions were filed.
 - i. The number of such detainees who were released after filing writs of habeas corpus.
 - j. The numbers of such detainees who are currently released on supervision orders.
 - k. The conditions of supervised release of such detainees, including but not limited to release notices and orders, supervision orders, Intensive Supervision and Appearance Program (ISAP) conditions, and Enhanced Supervision/Reporting (ESR) conditions.
 - l. The number of such detainees who have subsequently been removed.
10. All records reflecting the following information for all detainees with administratively final orders of removal that were not judicially stayed (not just those detained six months following the entry of a final order of removal that was not judicially stayed), and who were released from custody from November 14, 2001 onward for reasons other than their removal not being significantly likely in the reasonably foreseeable future:
- a. The number of such detainees released per year.
 - b. The start and end dates of their detention.
 - c. The number of such detainees released per year by field office.
 - d. The nationality of such detainees.
 - e. The date of such detainees' final administrative order of removal, and if the removal order was stayed, the date the stay was lifted.
 - f. The length of such detainees' total detention since being taken into ICE custody.

- g. The length of such detainees' post-final-order detention (i.e., from when a final administrative order was issued, or in the case of a removal order that was stayed, from the date when the stay was lifted).
 - h. The number of such detainees who filed petitions for writs of habeas corpus, and the case name and court where such petitions were filed.
 - i. The number of such detainees who were released after filing writs of habeas corpus.
 - j. The numbers of such detainees who are currently released on supervision orders.
 - k. The conditions of supervised release of such detainees, including but not limited to release notices and orders, supervision orders, Intensive Supervision and Appearance Program (ISAP) conditions, and Enhanced Supervision/Reporting (ESR) conditions.
 - l. The number of such detainees who have subsequently been removed.
11. All records related to DHS, ICE, Headquarters Post-Order Detention Unit (HQPDU), and individual ICE field office policies, procedures, and/or guidelines on POCRs and conditions of supervised release, including but not limited to manuals, guidances, instructions, policy statements, legal memoranda, training materials, and sample forms, worksheets, and letters.
 12. All records related to DHS, ICE, Headquarters Post-Order Detention Unit (HQPDU), and individual ICE field office policies, procedures, and/or guidelines regarding the detention, custody review, release, and conditions of supervision of noncitizens whose removal has been judicially stayed, including but not limited to manuals, guidances, instructions, policy statements, legal memoranda, training materials, and sample forms, worksheets, and letters.
 13. All records reflecting the following information for individuals who were detained under the mandatory detention provision, 8 U.S.C. § 236(c), from November 14, 2001 onward and who ultimately prevailed in their removal cases:
 - a. The start and end dates of their detention.
 - b. The start and end dates of their detention when they were held under § 236(c).
 - c. The date that removal proceedings were terminated or otherwise concluded in their favor.
 - d. The number of such detainees organized by field office.
 - e. The nationality of such detainees.
 - f. The specific basis for their release (i.e., "proceedings terminated," cancellation of removal granted, adjustment of status granted, asylum granted).

Your request has been processed under the FOIA, 5 U.S.C. § 552. A search of the ICE Office of Enforcement and Removal Operations (ERO) produced four (4) excel spreadsheets that are responsive to items 3, 6, 9, and 10 of your request. After review of those spreadsheets, I have determined that portions of those files will be withheld pursuant to Exemptions 6, 7(C), and 7(E) of the FOIA as described below.

With respect to item 13 of your request, please be advised that the ICE ERO Statistical Tracking Unit (STU) has indicated that this information is not tracked in their database.

In your letter dated March 17, 2011, you indicated that as to questions 2, 4, and 7 of your request, you clarified your request that you seek copies of the actual written "Decision to Continue Detention" issued to the detainees subsequent to their post-order custody review. After review, I have determined that these records are likely to be maintained within the alien file (A-file) of each individual. A-files are maintained by U.S. Citizenship and Immigration Services (USCIS). Accordingly, I am referring your request, along with a copy of your FOIA Request and March 17,

2011 letter, to USCIS for processing and direct response to you as to items 2, 4, and 7 of your request.

ICE has applied Exemptions 6 and 7(C) to protect from disclosure third party names, A-numbers, dates of birth, detention stay identification numbers, ENFORCE integrated identification numbers, and detention identification numbers.

FOIA Exemption 6 exempts from disclosure personnel or medical files and similar files the release of which would cause a clearly unwarranted invasion of personal privacy. This requires a balancing of the public's right to disclosure against the individual's right privacy. The privacy interests of the individuals in the records you have requested outweigh any minimal public interest in disclosure of the information. Any private interest you may have in that information does not factor into the aforementioned balancing test.

FOIA Exemption 7(C) protects records or information compiled for law enforcement purposes that could reasonably be expected to constitute an unwarranted invasion of personal privacy. This exemption takes particular note of the strong interests of individuals, whether they are suspects, witnesses, or investigators, in not being unwarrantably associated with alleged criminal activity. That interest extends to persons who are not only the subjects of the investigation, but those who may have their privacy invaded by having their identities and information about them revealed in connection with an investigation. Based upon the traditional recognition of strong privacy interest in law enforcement records, categorical withholding of information that identifies third parties in law enforcement records is ordinarily appropriate. As such, I have determined that the privacy interest in the identities of individuals in the records you have requested clearly outweigh any minimal public interest in disclosure of the information. Please note that any private interest you may have in that information does not factor into this determination.

ICE has applied Exemption 7(E) to protect from disclosure internal agency codes, initial charge codes, and event numbers.

FOIA Exemption 7(E) protects records compiled for law enforcement purposes, the release of which would disclose techniques and/or procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law. I have determined that disclosure of certain law enforcement sensitive information contained within the responsive records could reasonably be expected to risk circumvention of the law. Additionally, the techniques and procedures at issue are not well known to the public.

You have the right to appeal our withholding determination. Should you wish to do so, you must send your appeal and a copy of this letter, within 60 days of the date of this letter to: U.S. Immigration Customs Enforcement, Office of Principal Legal Advisor, U.S. Department of Homeland Security, 800 North Capitol Street, N.W., Stop 5009, Washington, D.C. 20536-5009. Your envelope and letter should be marked "FOIA Appeal." Copies of the FOIA and DHS regulations are available at www.dhs.gov/foia.

The Office of Government Information Services (OGIS) also mediates disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. If you wish to contact OGIS, you may email them at ogis@nara.gov or call 1-877-684-6448.

If you need to contact our office about this matter, please refer to FOIA case number **2011FOIA0003**. This office can be reached at (202) 732-0300 or (866) 633-1182.

Sincerely,

A handwritten signature in black ink, appearing to read 'MPK FOR', is positioned above the printed name.

Catrina M. Pavlik-Keenan
FOIA Officer

Enclosure: (4) Excel Spreadsheets

EXHIBIT EE



May 5, 2011

U.S. Immigration and Customs Enforcement
Office of Principal Legal Advisor
U.S. Department of Homeland Security
800 North Capitol Street, N.W.
Stop 5009
Washington, D.C. 20536-5009

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
IMMIGRANTS'
RIGHTS PROJECT

**RE: FOIA Case Number 2011-FOIA-0003 Freedom of Information
Act / Privacy Act — Second Appeal to ICE**

PLEASE RESPOND TO:
NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2660
F/212.549.2654
WWW.ACLU.ORG

OFFICERS AND DIRECTORS
SUSAN H. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

Dear Sir or Madam,

Pursuant to 6 C.F.R. § 5.9, the American Civil Liberties Union (ACLU) appeals U.S. Immigration and Customs Enforcement's (ICE) "second and final" response of April 26, 2011 (the "Final Response") to its September 21, 2010 request (the "Request"), file number 2011-FOIA-0003, under the Freedom of Information Act (FOIA).

The Request seeks records related to prolonged immigration detention and the post-order custody review (POCR) process that the Department of Homeland Security (DHS) applies to immigration detainees with administratively final orders of removal. *See* Request (attached as **Exhibit A**).

By letter dated March 4, 2011, ICE provided a partial response to the Request. *See* Pavlik-Keenan Letter, dated March 4, 2011 (attached as **Exhibit B**). The ACLU appealed that response by letter dated March 31, 2011. *See* ACLU FOIA First Appeal, dated March 31, 2011 (attached as **Exhibit C**). On April 14, 2011, the ICE Office of the Principal Legal Advisor remanded the Request to ICE's FOIA Office in light of a Supreme Court ruling on Exemption 2, and stated that "[a]ll other issues raised in your appeal are to be addressed on remand." *See* Mathias Letter, dated April 14, 2011 (attached as **Exhibit D**). On April 26, 2011, ICE issued its Final Response to the Request and provided some documents that ICE purported to be responsive to the Request. *See* Final Response (attached as **Exhibit E**)

* * *

The ACLU hereby submits this appeal of the Final Response because this “second and final” response to the Request is inadequate.

ICE’s production is not responsive to the concerns the ACLU raised in its first appeal of March 31, 2011, or to the initial FOIA Request itself.

Moreover, ICE referred items 2, 4, and 7 of the Request to U.S. Citizenship and Immigration Services (USCIS) on the ground that the requested records are likely to be maintained in A-Files. However, ICE failed to indicate that it would provide USCIS with the A-file numbers or any other way of identifying the individuals as to whom the ACLU requested information that would be maintained in A-Files. ICE is the agency that is most likely to possess in its databases the information necessary to identify the individuals as to whom the ACLU requested information that may be contained in A-Files. Nor did ICE provide any basis for their belief that the requested records are likely to be held in individual A-files maintained by USCIS.

Furthermore, ICE stated that ICE ERO’s Statistical Tracking Unit does not track the information requested in Item 13 of the Request. However, ICE failed to provide a reasonable explanation why the requested information is not tracked by STU or to provide information as to which agency or other sub-division of ICE would be more likely to maintain such information. ICE did not refer this Item of the Request to any other entity.

The ACLU also objects to the exemptions ICE asserted in conclusory fashion as the basis for redacting certain portions of the documents released. Specifically, the ACLU seeks review of ICE’s use of FOIA Exemptions 6, 7(C), and 7(E) in the Final Response to withhold information from public view and to withhold from disclosure requested documents, including but not limited to, agency codes, ENFORCE integrated identification numbers, agency employee training materials, memoranda, worksheets, and other guidance documents. For each of the claimed exemptions, ICE has failed to provide a reasonably detailed explanation as to why the claimed exemptions apply to the withheld or redacted documents.

* * *

Pursuant to 5 U.S.C. § 552(a)(6)(A)(ii), we expect a response within the twenty (20) day statutory time limit. If you have any questions in processing this request, I can be contacted by mail at the address below, or by telephone at (212) 284-7316.

Sincerely,



AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

Ms. Tanaz Moghadam
Staff Attorney
ACLU Immigrants' Rights Project
125 Broad St., 18th Floor
New York, NY 10004
Tel: 212-284-7316
Fax: 212-549-2654
Email: tmoghadam@aclu.org

EXHIBIT FF

U.S. Department of Homeland Security
800 N. Capitol St. NW STOP-5009
Washington, DC 20536-5009



U.S. Immigration
and Customs
Enforcement

May 9, 2011

TANAZ MOGADAM
ACLU IMMIGRANTS' RIGHTS PROJECT
125 BROAD ST., 18TH FL.
NEW YORK, NY 10004-2400

Dear Sir or Madam:

The Department of Homeland Security has received your letter appealing the adverse determination of your Freedom of Information Act/Privacy Act (FOIA/PA) request by U.S. Immigration and Customs Enforcement seeking records related to the Post-Order Custody Review Process.

On behalf of the Chief for the Government Information Law Division, we acknowledge your appeal request of **2011FOIA0003** and are assigning it number **OPLA11-172** for tracking purposes. Please reference this number in any future communications about your appeal.

A high number of FOIA/PA requests have been received by the Department. Accordingly, we have adopted the court-sanctioned practice of generally handling backlogged appeals on a first-in, first-out basis.¹ While we will make every effort to process your appeal on a timely basis, there may be some delay in resolving this matter. Should you have any questions concerning the processing of your appeal, please contact ICE FOIA at 1-202-732-0300, or by email at ice-foia@dhs.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "R. You", with a long, sweeping horizontal line extending to the right.

Susan Mathias
Chief
Government Information Law Division
ICE Office of the Principal Legal Advisor
Department of Homeland Security

¹ Appeals of expedited treatment denials will be handled on an expedited basis.